No. 14,616

IN THE

United States Court of Appeals

For the Ninth Circuit

ALASKA INDUSTRIAL BOARD, and
CARL E. JENKINS,
Appellants,

vs.

CHUGACH ELECTRIC ASSOCIATION, INC., a corporation, and GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellees ask for a rehearing because they believe the Court in its Opinion of April 29, 1957, inadvertently misconstrued the language of Section 43-3-4, ACLA 1949, which reads:

"§43-3-4. Modification of compensation: Continuing jurisdiction: Effect of review upon

minishing or increasing the compensation previously awarded, ordered, or agreed to, subject to the maximum or minimum provided in this Act."

The sentence starts off with the important words, "To that end." The clear meaning is, "For that purpose." It might as well have said "For the accomplishment thereof."

What is "that end"? What is "that purpose"? What is "to be accomplished"?

Context and grammar clearly affirm that "that end" is the provision in the immediately preceding or first sentence, namely: that, if after it is found that an employee is entitled to, or after an employee is awarded, compensation under one provision of the Act, it develops that the employee is or was entitled to a higher rate of compensation under that same or some other provision of the Act, that the Board shall have jurisdiction to award such higher rate of compensation, after first deducting the amount that has already been paid the employee.

"That end" modifies only the first sentence of the Section. The only possible "end" to be accomplished is to carry out the provisions of the first sentence of the Section.

"To that end" is a condition precedent to the whole of the second sentence. "To that end" is as much a condition precedent to the second clause of the second sentence, viz.: "and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order," as it

is to the first clause of the second sentence, viz.: "the Industrial Board is hereby given and granted continuing jurisdiction of every claim." Each is based upon the situation arising as stated in the first sentence. The English language permits of no other construction. It is incredible to believe that if an employer found that it was paying too much compensation to an employee that the Board would take jurisdiction unless the situation under the first sentence had arisen. The second sentence is a whole sentence. It is not divided into two parts. Its second clause is not separated from the first clause by even a semi-colon; but, only by a comma, clearly indicating that its intent, too, is based upon the existence of the situation provided for by the first sentence. If that situation does arise then the Board, if it finds facts upon which to base it, may either end, diminish, or increase the compensation, subject to the maximum or minimum provided by the Act, and, also, subject under the first sentence to deducting compensation already paid if the employee is awarded a higher rate of compensation.

Nowhere else in the Act is "continuing jurisdiction" granted. It is found only in this one sentence in Section 43-3-4, ACLA 1949.

The third sentence of that Section reads:

> "No such review shall affect such award, order or settlement as regards any moneys already paid, except that an award or order increasing the compensation rate may be made effective from a date of injury, and except that if any part of the compensation due or to become due is unpaid an award or order decreasing the compensation rate

> may be made effective from the date of injury, and any payments made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such methods as may be determined by the Industrial Board; provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop and claim be presented within three (3) years after the injury."

The review herein mentioned is that mentioned in the second sentence of the Section.

But here again is clearly disclosed that the second sentence is conditioned upon the situation arising under the first sentence, namely, upon it developing that the employee is entitled to an increased rate of compensation thereunder, because the last clause of the third sentence reads: "Provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop . . ."

This clause clearly subjects the whole of the second sentence to the situation arising as provided for by the first sentence.

It limits the jurisdiction to a claim for an increased rate of compensation. Thus, leaving the second and third clauses of the second sentence, if it be not subject by "To that end" viz.: "and said Board may, at any time and upon its own motion or on application, review any agreement, award, decision or order, and on such review, may make an order or award ending,

diminishing or increasing the compensation previously awarded, ordered, or agreed to," available only for use in a contention, which is not the case here, that the employee's compensation be ended or diminished, because the last clause of the third sentence clearly states: "Provided, however, that no compensation under such increased rate shall be paid unless the disability entitling the employee thereto shall develop . . . "

This proviso clearly declares the intent that the only "continuing jurisdiction" of any kind of the Board is based upon the situation arising under the first sentence of Section 43-3-4, ACLA 1949, because it is unthinkable that the Board of its own motion can end or diminish the employee's compensation, but not increase it, yet this proviso expressly prohibits an increase in the rate of compensation unless the situation arises under the first sentence of that Section. Clearly "To that end," which is the situation arising in the first sentence of the Section, governs and controls the whole of the second sentence of the Section.

Furthermore, the last clause of the third sentence puts the further limitation of time on when the "continuing jurisdiction" under the second sentence may be exercised, by stating "and claim be presented within three (3) years after the injury."

Thus, Appellees urge that the continuing jurisdiction which may be exercised by the Board under Section 43-3-4, ACLA 1949, is based upon two restrictions or limitations, viz.: First, that a situation arise, where an injured employee is entitled to or is awarded com-

pensation under some provision of the Act, and afterwards it develops that the employee is entitled to a higher rate of compensation under the same or some other provision of the Act; and, Second, that the employee's claim for such increased rate of compensation be presented within three years after he suffered his injury.

Such are not the facts here.

Appellees rely upon the late Judge Folta's Opinion herein, viz.: *Chugach Electric Assn. Inc., et al., v. Alaska Industrial Board, etc., et al.,* 122 F. Supp. 210, 15 Alaska Reports 97.

Appellees cite no other decisions, as Judge Folta's Opinion is based upon this particular Section.

Wherefore, Appellees pray that this Petition for a Rehearing may be granted.

Dated, Juneau, Alaska,
May 21, 1957.

Respectfully,
ROBERTSON, MONAGLE & EASTAUGH,
R. E. ROBERTSON,
M. E. MONAGLE,
F. O. EASTAUGH,
By R. E. ROBERTSON,
Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay, and that it is meritorious because this Honorable Court has inadvertently but erroneously misconstrued Section 43-3-4, ACLA 1949.

Dated, Juneau, Alaska,
May 21, 1957.

R. E. ROBERTSON,
Of Counsel for Appellees and Petitioners.